IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.90 OF 2002

Dr.Jyotsna Subhash Modak ...Appellant

Vs.

1. Dr.Smt.Gangubai @ Shalinibai Tilak
2. Dr.Shalinibai Vishnu Tilak Charitable Trust
3. Mrs.Meena Arun Sathe
4. Dr.M.N.Chaudhari
5. Dr.Shalinibai Vishnu Tilak
6. Sau.Padmaja Prakash Deshpande ...Respondents

Shri S.N.Chandrachud for the Appellants
Shri V.B.Tapkir for the Respondent Nos.2,3,5 and 6.
Shri Balasaheb Bandal h/f Shri Uday Warunjikar for the Respondent No.1

CORAM: A.S.OKA, J.

DATED: AUGUST 18, 2004.

P.C.:

1. Heard Shri Chandrachud appearing for the Appellant and Shri Tapkir for Respondent Nos. 2,3,5 and 6. The Appellant is the original Plaintiff and the Respondents are the original defendants. The suit is filed by the Appellant for specific performance of the agreement dated 3rd September 1977 executed by the Respondent No.1 in her favour. The Appellant is the daughter of the Respondent no.1. Both the Courts below have declined to grant relief of specific performance in favour of the Appellant. Both the Courts below have held that execution of the suit agreement has been

proved and it is also proved that the Appellant was ready and willing to perform her part of the suit agreement. However, the Courts below have exercised discretion under Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as the said Act of 1963) against the Appellant for the reasons recorded in the Judgments.

2. Shri Chandrachud the learned Counsel appearing for the Appellant submitted that the learned Trial Judge has exercised discretion under Section 20 of the said Act of 1963 mainly on the ground of hardship of the Respondent No.1 He invited my attention to the finding recorded by the Trial Court that if the decree for specific performance is passed, the Respondent No.1 who was an old lady will suffer hardship as the Respondent No.1 was residing with her servant in the suit building and that she has no other premises available. He submitted that due to unfortunate event of the death of the Respondent No.1 during the pendency of this Appeal, the ground on which the learned Trial Judge has refused to pass a decree for specific performance is no more in existence. He submitted that if the said ground is no more in existence, the decree for specific performance must follow as the suit agreement is held to be proved and it is also held that the Appellant has been ready and willing to perform her part of the agreement. He submitted that in respect of a part of the same property the Respondent No.1 had executed an agreement for sale in favour of one Usha Wakade who is a real sister of

the Appellant. The relief of specific performance was denied to the said daughter by both the Courts below. Being aggrieved by the Judgments and Decrees passed in the suit, the said Usha Wakade has preferred a Second Appeal in this Court which has been admitted for final hearing. He therefore submitted that this Appeal also deserves to be admitted and heard along with the said Second Appeal. He pointed out that reliance is placed by the contesting Respondents on a fabricated will of the Respondent No.1. He submitted that as the Respondent No.1 is no more alive, decree for specific performance deserves to be passed.

3. I have considered the said submissions. It is to be borne in mind that that the Appellant is the daughter of the Respondent No.1. On 3rd September 1977, the agreement for sale of the hospital premises was executed by the Respondent No.1 in favour of the Appellant. The agreed price as mentioned in the agreement is Rs.60,000/- out of which a sum of Rs.6,400/- is paid by the Appellant to the Respondent No.1 as earnest money. It is therefore clear that only 10% of consideration has been paid by the Appellant to the Respondent No.1. The suit for specific performance was filed nearly five and half years after the date of agreement i.e. on 19th March 1983. It is to be noted that when the suit was filed, as per the cause title of the plaint the age of the Respondent No.1 was 73 years. The contention raised in the suit is that the Appellant was put in possession of the

property subject matter of the agreement. The prayer for possession is incorporated in the plaint but the said prayer is made without prejudice to the main contention that the Appellant is in possession of the suit property. The said prayer is made in the alternative.

3. The Appellate Court has recorded a finding that that in the cross examination the Appellant admitted that she is not in a possession from the year 1981. The Appellant has also admitted in the cross examination that a partnership was made between the Respondent No.1 and the Appellant and as a partner, the Appellant was allowed to use some portion of the hospital to practice medicine. It is also admitted in the cross examination that the said partnership was subsequently dissolved. The Appellate Court has recorded a clear finding that the Appellant has suppressed the material fact in the plaint that she was not in possession from the year 1981. I find from the deposition of the Appellant that in the cross examination she admitted that she lost possession in the year 1981 and that she has not disclosed in the plaint that she lost possession in the year 1981.

4. The Trial Court has exercised the discretion under Section 20 against the Appellant mainly on the ground that the Respondent No.1 will suffer hardship. However, the Appellate Court has taken into consideration the conduct of the Appellant of suppressing the material fact in the plaint

that from the year 1981 she was not in possession of the property subject matter of the agreement. The perusal of the paragraph No.29 of the Judgment of the Appellate Court shows that the suppression of facts on the part of the Appellant is noted by the Appellate Court. The Trial Court has also considered the inadequacy of price fixed in the agreement. It is true that inadequacy of price by itself is no ground to refuse the decree of specific performance of the agreement. Considering all the factors the Appellate Court has declined to exercise discretion under Section 20 of the said Act in favour of the Appellant.

5. If the findings recorded by the Appellate Court are perused, it is clear that discretion under Section 20 is not exercised arbitrarily. While exercising the discretion, factors which are relevant and germane are taken into consideration. Merely because some other view is possible on the basis of evidence on record, is no ground to interfere under Section 100 of the Code of Civil Procedure, 1908. The ground of hardship to the Respondent No.1 which is relied upon the Trial Court may not be in existence today. However, when the suit was decided, the said ground was a very relevant ground for exercising discretion under Section 20 of the said Act against the Appellant. As stated earlier, the Appellate Court has exercised the discretion under Section 20 of the said Act against the Appellant on the ground of suppression of material facts by the Appellant. No fault can

be found with the Appellate Court for exercising discretion against the Appellant Plaintiff in a suit for specific performance filed by her against her old mother.

6. No substantial question of law arises in this Second Appeal, the same is dismissed with no order as to costs.

7. As the Second Appeal is not admitted, cross objection filed by the Respondents is not entertained. However, it will be open for the Respondents to file an Appeal in case they are aggrieved by any part of the impugned Judgments and Decrees.

Judge.